DOCUMENT RESUME

ED 207 075 CS 206 589

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TITLE Journalism, Privacy, and Embarrassing Facts: A Critical Review of the Newsworthiness Defense.
PUB DATE Apr 81
NOTE 26p.; Paper presented at the Annual Meeting of the Eastern Communication Association (Pittsburgh, PA, April 24-26, 1981).

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Court Doctrine; Court Litigation; *Freedom of Speech; Higher Education; Journalism; *Legal Problems; *News Reporting; *Privacy; *Theories; Torts

ABSTRACT

Noting that while much has been said about privacy and the defense of newsworthiness in legal cases involving the unauthorized publication of true but embarrassing facts, this paper points out that there appear to be only three broadly distinguishable--and largely disparate--theories of privacy and newsworthiness, none of them in circulation long enough to have influenced the courts. In an effort to examine these theories critically, the paper begins with a brief overview of the conflict between privacy and a free press, with an emphasis on the legal and moral tension created by an individual's desire to conceal embarrassing facts and the journalist's proclivity to disclose them. The next sections of the paper delineate the three existing theories of newsworthiness, which include (1) the doctrine of Supreme Court Justices Hugo Black and William O. Douglas, giving almost exclusive weight to First Amendment concerns; (2) Thomas Emerson's definitional approach, which calls for full protection of privacy, even when privacy runs counter to a free press; and (3) the standard set forth by Alexander Meikeljohn, refined by Edward Bloustein and operationalized by Randall Bezanson, which defines newsworthiness in terms of the purpose of self-government. The concluding section offers an appraisal of each theory in terms of its contribution to legal theory and, more pragmatically, each theory's contribution to a workable compromise between newsworthiness and invasion of privacy. (RL)

JOURNALISM, PRIVACY, AND EMBARRASSING FACTS: A CRITICAL REVIEW OF THE NEWSWORTHINESS DEFENSE

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Presented to the Mass Communication Interest Group of the Eastern Communication Association, Pittsburgh, April 1981.

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A CRITICAL REVIEW OF THE NEWSWORTHINESS DEFENSE

The right of privacy and freedom of the press may come in conflict in a variety of ways, but the oldest controversy--and the most serious from a journalistic perspective--arises from the unauthorized publication of true but embarrassing facts. To be sure, when private facts are both offensive to a reasonable person and of no legitimate public concern, their publication constitutes a civil tort, a wrongful act for which the press is fully responsible under the common law of privacy. While the First Amendment protects a robust and uninhibited press,[1] there appears to be no Constitutional privilege to pander to vulgar curiosity by publishing lurid gossip.

Unwanted and unnecessary publicity lies at the core of the common law of privacy. Its history begins in 1890 with the publication of Samuel Warren's and Louis Brandeis' Harvard Law Review article on "The Right to Privacy," a seething attack on journalism's invasion of "the precincts of private and domestic life."[2] When in 1960 William Prosser reformulated privacy into four distinct torts,[3] public disclosure of embarrassing facts--what Kalven calls the "mass communication tort of privacy"[4]--retained its status as the "true" or "pure" invasion of privacy; the other torts, one commentator suggests, "are offspring from the wrong side of the blanket, scions of meretricious liasions between privacy and the torts of trespass, defamation, and . . . trade-mark infringement."[5] In short, embarrassing facts as news remains the principal privacy controversy, an issue of Constitutional proportion insofar as "news" falls within the purview of the First Amendment.

Although the Supreme Court let pass a recent opportunity to examine the Constitutionality of the public disclosure tort,[6] the courts ordinarily protect any press report "of public or general interest," including stories

"concerning interesting phases of human activity."[7] Under the common law privilege of "newsworthiness," embarrassing facts as news would not, in principle, qualify as an invasion of privacy. In practice, however, the newsworthiness defense offers a confused and problematic answer to the question of what constitutes a tortious public disclosure. Understandably, the courts are reluctant to even define news or newsworthy, especially since the Supreme Court expressly advised against "committing this task to the conscience of judges."[8] But with the press as the sole arbiter of its own defense, newsworthiness is defined descriptively, not normatively, and the judiciary is left with a strictly empirical and hopelessly tautological view of the newsmaking process. news is whatever journalists say it is.[9] As attractive as this view may be to the press, it presents an almost insurmountable barrier for the plaintiff. Realistically, how can an individual demonstrate invasion of privacy by the press when virtually everything published by the press qualifies as news and is therefore privileged as "newsworthy"? As Kalven observes, the defense of newsworthiness may be "so overpowering as virtually to swallow the tort."[10]

Since the courts have neither advanced nor adopted a unified theory of news, the concept of newsworthiness "has no generally accepted meaning, nor one that can be poured into it."[11] And yet, without a workable and defensible definition of newsworthy, judges and juries are afforded no realistic guidance and plaintiffs are extended no effective protection.

While much has been said about privacy and the defense of newsworthiness,[12] there appears to be only three broadly distinguishable--and largely disparate--theories, none of them in circulation long enough to have influenced the courts. In an effort to critically examine these theories, this paper begins with a brief overview of the conflict between privacy and a free press, with an emphasis on the legal and moral tension created by an individual's desire to conceal

embarrassing facts and the journalist's proclivity to disclose them. Preceded by a description of the three theories of newsworthiness, the concluding section offers an appraisal of each theory in terms of its contribution to legal theory and, more pragmatically, as a contribution to a workable compromise between newsworthiness and invasiveness.

Privacy Rights and a Free Press

Privacy has been defined in a variety of ways, from a broad right "to be let alone"[13] to what Westin believes is an essential aspect of self-determination.[14] It has been said that privacy insures "autonomy, identity, and intimacy",[15] it preserves human dignity and fosters individuality;[16] it is "the right not to participate in the collective life--the right to shut out the community."[17] At the very least, privacy is concerned with an individual's accessibility to others: "the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention."[18] Broadly and ultimately, privacy has been described as a natural right, what Marnell calls the "inalienable right of the individual to hold inviolate the fortress of self."[19]

Natural right or not, the Supreme Court did not recognize privacy as a Constitutional right until 1965.[20] Like many other Constitutional protections, however, the privacy right created by the Court in Griswold v. Connecticut serves only to protect individuals from an overbearing and too powerful government. Just as the First Amendment does not ordinarily function as a safeguard against private abridgement of expression, the Griswold Court's construction of a privacy right offers no protection against private--as opposed to governmental--intrusion. As the New York Supreme Court recently held, "There is no legal extension of the Constitution so as to afford protection to one private party from acts of another private person or corporate entity."[21]

Whatever protection might exist from invasion of privacy by the press is, therefore, a matter of common law or statutory law, not Constitutional law. But since any law that restricts or inhibits free expression is likely to come in conflict with the Constitution, particularly the First Amendment, the conflict between privacy and freedom of the press is typically a lopsided conflict between common law and Constitutional law. Almost inevitably, a free press prevails because the Constitution and its amendments necessarily take "precedence over any competing, non-constitutional policy."[22] Consequently, the common law of privacy--especially the public disclosure tort, which often runs counter to the demands of the Fist Amendment--appears to be Constitutionally infirm. To effectively protect an individual from publication of embarrassing facts would require the courts to limit the scope of the First Amendment, a Constitutional controversy in which few judges are anxious to become involved.

Under the guise of "newsworthiness," the courts have thus extended exceptionally broad protection to the press, even under those circumstances when the press obviously exploits its privilege to report the news. The foremost public disclosure case, Sidis v. F-R Publishing Corp.,[23] serves well to illustrate the tension between privacy claims and a free press, and underscores as well the judiciary's resolve to define newsworthiness so broadly that, as Kalven feared, not much remains of the privacy tort. Often described as a classic case, Sidis involved a one-time child prodigy, William James Sidis, who sued for invasion of privacy when the New Yorker magazine published an article that not only "dredged up the public past of a person who wanted the world to forget his past" but exposed the more recent past of a person who "gave up all professional ambitions for a life as a semi-recluse employed in relatively mindless jobs."[24] One of a series of articles on formerly prominent individuals, "Where Are They Now? April Fool"[25] recounted Sidis' early days as an eleven year-old Harvard

mathematics lecturer, his graduation from Harvard College at sixteen, his three years at Harvard Law School, and his faculty position at a university in Texas. But the truly intrusive aspects of the article focused on Sidis' physical characteristics, his mannerisms, his living conditions, and, ironically, the fact that Sidis scorned publicity. Accordingly, the thirty-nine year-old eccentric--who had lived in relative obscurity for nearly eleven years--charged that the New Yorker article exposed him to "unwanted and undesired publicity" and subjected him to "public scorn, ridicule, and contempt."[26]

Finding no relevant case "which held the 'right of privacy' to be violated by a newspaper or magazine publishing a correct account of one's life or doings," the District Court for Southern New York dismissed Sidis' privacy claims.[27] The Second Circuit Court of Appeals affirmed the dismissal: so long as the press confines itself to "the unembroidered dissemination of facts," the Court held, the "prying of the press" deserves protection.[28] Only when public revelations are "so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency" would privacy claims outweigh the public's interest in information.[29]

The "community's notion of decency" standard was clarified somewhat by the Ninth Circuit Court of Appeals in Virgil v. Time, Inc.,[30] a case involving a Sports Illustrated account of the strange behavior[31] of a body surfer named Mike Virgil. The Virgil Court flatly rejected the proposition that the newsworthiness privilege extends to all true statements:

> To hold that privilege extends to all true statements would seem to deny the existence of "private" facts, for if facts be facts--that is, if they be true--they would not (at least to the press) be private, and the press would be free to publicize them to the extent it sees fit. The extent to which areas of privacy continue to exist, then, would appear to be based not on rights bestowed by

law but on the taste and discretion of the press. We cannot accept the result.[32]

Instead, the Court of Appeals in Virgil proposed that a line be drawn between information to which the public is entitled and publicity which becomes nothing more than " a morbid and sensational prying into private lives for its own sake,, with which a reasonable member of the public, with decent standards, would say that he had no concern."[33] Nonetheless, a district court in California, to which Virgil was remanded, found the Sports Illustrated article "simply not offensive to the degree of morbidity or sensationalism" necessary for an actionable privacy claim.[34] "Any reasonable person reading the Sports Illustrated article," the lower court concluded, "would have to conclude that the personal facts concerning Mike Virgil were included as a legitimate journalistic attempt to explain Virgil's extremely daring and dangerous style of bodysurfing."[35]

Thus if the appellate courts in Sidis and Virgil recognize the importance of--and perhaps even promote--a sense of decency on the part of the press, it is not clear that the courts have come to grips with the specific issue of the morality of unauthorized and unwanted publicity. Does the press lose its "sense of decency" because it deprives someone of privacy or because it defies community standards? More to the point, can privacy be defined in terms of community standards? From this judiciary's perspective, what are the questions and issues relevant to a prima facie case? Indeed, it is not always clear that the courts--especially the Sidis and Virgil courts--fully appreciate that the right of privacy "refers to the right of the individual to exclude society from his private life, not the right of the community to be spared unpleasant and seamy stories."[36]

Embarrasing Facts as News

While the Supreme Court recognizes a "zone of privacy surrounding every

individual," and while the Court further recognizes the state's legitimate interest in protecting an individual from "intrusion by the press,"[37] little has been done to define the contours of such a "zone" or to retard the journalist's ability to penetrate it. There are, of course, those few instances when the courts have upheld the plaintiff's privacy claims. In Barber v. Time, Inc.,[38] for example, the press enjoyed no privilege to publish intimate details--along with a photograph--of a hospitalized woman's gross obesity. Similarily, in Daily Times Democrat v. Graham,[39] publication of a photograph of a woman whose dress had been blown above her waist by a jet of air at a fun house proved to be an invasion of her privacy. Finally, in Melvin v. Reid,[40] a court found in favor of a reformed prostitute whose privacy had been violated by a movie depicting her as a prostitute and dramatizing her real-life role in a murder trial; despite the essential accuracy of the movie portrayal, the successful rehabilitation of the plaintiff proved to be more important than the public's interest in her former activities. But for the most part these are the exceptions, not the rule, even judicial tolerance has its limits.

Significantly, since Time, Inc. v. Hill in 1967,[41] when the Supreme Court applied to privacy the Constitutional fault standard used to protect the press in libel litigation, there has been no reported case "in which a plaintiff has succeeded in finally recovering damages for truthful disclosure by the press."[42] Although Hill involves the "false light" tort, it is significant that the Court cites with approval a number of non-actionable cases brought to court under the public disclosure tort.[43] As in libel, truth may soon emerge as an unqualified defense against an individual's privacy claims. Both the press and the courts seem to agree that the First Amendment stands out as "the predominant factor in determining the scope of an individual's right to sue the media for portrayals that impinge upon his privacy."[44] Ellis' observation offers a succinct summary of the present state of the public disclosure tort: "An attorney who accepts

a disclosure case on a contingency fee basis is either desperate or extremely dedicated."[45]

If the newsworthiness privilege appears to be overwhelming in Sidis, its scope is virtually boundless today. With "truth" and "news" used interchangeably, the newsworthiness defense becomes the defense of truth. Is there no news the public can be asked to forgo?

The vague and ambiguous defense of newsworthiness fails to protect an individual's interest in privacy if for no other reason than the terms used to define "newsworthiness" are themselves vague and ambiguous. When the courts use a "public interest" standard to distinguish between news and other kinds of freshly acquired information, do they mean "of public interest" or "in the public interest"? The courts obviously prefer the former, since information "of public interest" is a simple empirical question to which the press is more than willing to contribute its ready answer.[46] Even the Virgil Court, with its emphasis on information "of legitimate concern to the public," fails to explicate a workable doctrine that might reasonably define such terms as "concern" and "public." Does "concern" denote a need to know or merely a keen interest? And does "public" refer to a publication's general audience or, as political scientists and sociologists use the term, a collectivity of individuals "who regard themselves as likely to become involved in the consequences of an event and are sufficiently concerned to interest themselves in the posibility of control"?

Should the courts opt for protecting only information "in the public interest," are they prepared to distinguish between publications which entertain or amuse and publications which inform or educate? And would such a distinction be of any Constitutional consequence? In other words, does the First Amendment apply with less force to a "frivolous" press as opposed to a "serious" press?

These are only a few of the questions to which a coherent theory of newsworthiness might address itself. If nothing else, such a theory must identify--

conceptually and operationally--the limits to the newsworthiness defense. Moreover, a theory of newsworthiness would need to reconcile society's interest in protecting an individual's privacy with society's interest in free expression.

Theories of Newsworthiness

In light of the concern over the conflict between privacy and freedom of the press, the courts may soon be ready to adopt--if not formulate on their own--a theory of newsworthiness. To this end, three existing theories may prove instructive: (i) the Black-Douglas doctrine, which gives almost exclusive weight to First Amendment concerns; (ii) Emerson's definitional approach, which calls for full protection of privacy, even when privacy runs counter to a free press; and (iii) a Meikeljohnian standard--refined by Bloustein and operationalized by Bezanson--which defines newsworthiness in terms of the purpose of self-government.

The Black-Douglas Doctrine

As absolutists, Justices Black and Douglas prefer a strict and literal interpretation of the First Amendment. There is, Douglas said in his concurring opinion in Cox Broadcasting Corp. v. Cohn, "no power on the part of government to suppress or penalize the publication of 'news of the day.'"[47] The First Amendment, from the perspective of Black and Douglas, means no laws abridging freedom of the press, and that would include the common law of privacy as well as efforts by state legislatures to protect their citizens from an intrusive press. When Douglas expressed his support for privacy in Griswold, it was state intrusion, not private intrusion, he sought to eliminate. Decidedly, the privacy right articulated by Douglas in Griswold serves to enhance freedom of expression by protecting the "right to know", within the narrow context of Griswold, privacy appears to be fully consistent with an absolutist's reading of the First Amendment.

When freedom of the press is at stake, it is, for Douglas, "irrelevant to talk of any right of privacy."[48] Both Douglas and Black reject the "weighing process" whereby a compromise might be reached between privacy rights and a free press. In his concurring opinion in Time, Inc. v. Hill, in which Douglas joined, Black wrote:

> if the judicial balancing choice of constitutional changes is to be adopted by this Court, I could wish it had not started on the First Amendment. The freedoms guaranteed by that Amendment are essential freedoms in a government like ours. That Amendment was deliberately written in language designed to put its freedoms beyond the reach of government to change while it remained unrepealed. If judges have, however, by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms. If there is any one thing that could strongly indicate that the founders were wrong in reposing so much trust in a free press, I would suggest that it would be for the press itself not to wake up to the grave danger to its freedom, inherent and certain in this "weighing process."[49]

Both justices even reject the "actual malice" standard as essentially unconstitutional since it expressly narrows the ambit of the First Amendment. As a standard of liability, "knowing or reckless falsity" is, in Douglas' words, an "elusive exception" to the First Amendment, an abridgement of speech which gives the jury "broad scope and almost unfettered discretion."[50] Thus, while many commentators see Hill as an important step toward protecting the press, Black and Douglas view it as one more attempt to constrain what would otherwise be a free press.

Given their views on the viability of Prosser's "false light" tort and the standard of liability used by the Court in Hill, there is little ddubt that Black and Douglas would not support in any way press liability for publishing true but embarrassing facts. To be sure, Black and Douglas stand firm in their conviction that a free press cannot withstand the kind of balancing approach the courts must use if the common law of privacy is to survive. That the newsworthiness defense seems to be decimating the public disclosure tort would be of little concern to Black and Douglas. "The press will be 'free' in the First Amendment sense," Douglas once said, "when the judge-made qualifications of that freedom are withdrawn."[51] Under the Black-Douglas doctrine, in short, the press would have an unqualified privilege to report the day's news, even if such reportage invaded the privacy of those individuals about which the press reports. Black and Douglas thus offer a simple but effective resolution of the conflict between privacy and publicity: no liability for the press.

Emerson's Definitional Approach

Like Black and Douglas, Emerson rejects a balancing or weighing approach. Unlike Black and Douglas, however, Emerson confronts the conflict between privacy and freedom of the press by delineating the privacy right and by reserving full protection for it; that is, he uses a definitional approach, an effort to define the right of privacy and then "accord that right full protection against claims based on freedom of the press."[52] For Emerson, the right of privacy calls for "protection for the individual against all forms of collective pressure."[53] Not limited to state or governmental intrusion, Emerson's theory would support press liability--albeit strictly limited liability--for invading an individual's zone of privacy.

In Emerson's view, freedom of the press serves social interests, whereas privacy serves the individual, and "the individual rights of privacy would plainly take precedence over the collective interest."[54] Indeed, Emerson would go so

far as to protect the individual "against intrusion by any rule regulation, or practice of the society in its collective capacity"; thus the First Amendment "would be subordinate to the requirements of the privacy right."[55] Interestingly, Emerson's concern for privacy is rooted in his desire to maintain an effective system of freedom of expression. More often than not, freedom of expression and privacy are mutually supportive, especially when they combine to enhance individual self-fulfillment. When the two are in conflict, however, Emerson uses as his guiding principle the need to protect only that right which does not injure another person. For this reason, when privacy and freedom of the press come in conflict with each other, Emerson believes the right of privacy should prevail.

The privacy Emerson wants to protect extends only to "matters related to the intimate details of a person's life: those activities, ideas or emotions which one does not share with others or shares only with those who are closest."[56] Although Emerson does not offer an exhaustive list of protected "activities, ideas or emotions," he cites, for example, family relations, bodily functions, and sexual relations. He would unequivocally exclude from protection any violation of privacy resulting from publication of any officially public document or proceeding. Moreover, Emerson would afford the press some "breathing space" when discussing the public conduct of public figures or public officials; individuals "who operate in the limelight," Emerson reasons, "cannot expect the same degree of privacy about their personal lives."[57]

In sum, the protection Emerson would extend to the press is broad and encompassing, the press would be held liable for disclosing embarrassing facts only when those facts "touched the inner core of intimacy."[58] Privacy would indeed prevail over the First Amendment, but privacy, for Emerson, is narrowly defined and, in theory, defined precisely enough for the courts to be able to decide when and where the newsworthiness defense applies.

A Meikeljohnian Standard

Bloustein and Bezanson, in separate but related articles, put forth a theory of newsworthiness rooted in the First Amendment theory of Alexander Meikeljohn. In brief, Meikeljohn's interpretation of the First Amendment rests on the fundamental importance of the right to know, not the right to speak. For Meikeljohn, the right to speak is essentially a private right, whereas the right to know is a public right; and it is only the public's right to know, in Meikeljohn's view, which deserves full First Amendment protection. "What is essential," he argues, is "not that everyone shall speak" but that "everything worth saying shall be said."[59] The goal of the First Amendment, Meikeljohn is convinced, is not to sustain "unregulated talkativeness."[60] From Meikeljohn's perspective, First Amendment protection for the right to know is justified as a necessity of self-government, it is essential that citizens be exposed to expressions which bear upon "issues with which voters have to deal."[61] As Bloustein understands it, Meikeljohn's contention is this:

> The test for freedom of speech under the first amendment is whether discussion of the given subject matter contributes to the public understanding essential to self-government. If the communication fulfills this purpose, it should not be restricted. If it does not fulfill this purpose, the communication may be subject to reasonable limitation in the public interest just like the exercise of any other private right.[62]

Accordingly, Bloustein proposes a "test of relevance" which, if not met, would justify reasonable restrictions on the public disclosure of embarrassing facts. Bloustein's relevance test is, simply, "whether what is published concerning a private life is relevant to the public understanding necessary to the purposes of self-government."[63] Thus while Bloustein would support an "unqualified first amendment right of the public to learn about those aspects of private lives

which are relevant to the necessities of self-government," he would support only a qualified Fifth Amendment right of a publisher to "satisfy public curiosity and publish lurid gossip about private lives."[64]

Bloustein's test of relevance is greatly enhanced by Bezanson's efforts to demonstrate that not all public disclosures are "equally entitled to constitutional privilege."[65] Although, curiously, Bezanson makes no explicit reference to Meikeljohn, his distinction between the communicative value of a disclosure and its impact value closely parallels Meikeljohn's distinction between the public and private uses of speech. In Bezanson's attempt to balance privacy claims and freedom of the press, the role of the disclosure--its communicative value versus its impact value--will decide its constitutional value.[66] He would accept at face value the "newsworthiness" of whatever appeared in the press. "But to conclude that every article and every invasive public disclosure published by the press is newsworthy, "Bezanson cautions, "is not to conclude that every newsworthy disclosure should be constitutionally privileged."[67]

Specifically, Bezanson distinguishes between the First Amendment protection of the news story and First Amendment protection of the tortious disclosure--a distinction between the substance and means of expression.[68] Bezanson would want the courts to examine the nexus between the disclosed facts and the substance of the article.[69] Does the disclosure narrow the reader's perspective or foreclose reader understanding? [70] Is the disclosure used to enhance the subject matter of the article or is it used to attract reader interest?[71] In other words, if the disclosure is reasonably communicative, it deserves First Amendment protection; if, however, its principal value is impact, privacy rights would prevail.

Both Bloustein and Bezanson are concerned with the need to know, they differ, however, on their level of analysis. While Bloustein talks about the

public's need to know, Bezanson refers to the reader's need to know. The difference between "public" and "reader" is, perhaps, more apparent than real: whether the analysis focuses on the value of the disclosure to society in general or the reader in particular, its value--what Bezanson calls its communicative dimension--will determine its First Amendment protection and, in the end, impose limits on the defense of newsworthiness.

Newsworthiness Reconsidered

The Black-Douglas doctrine is an appealing solution to the press-privacy controversy only to the extent that society has no interest in freedom from the press. Given the pervasive presence of modern media of communication, public disclosure of private facts is today far more damaging than it was nearly a century ago when Warren and Brandeis introduced the "right to privacy." For Black and Douglas to argue against any liability for the press--even when the press aimlessly turns a private affair into a public spectacle--is to deny the need to hold the press accountable for its actions. If the press remains responsive only to marketplace forces, as Black and Douglas would prefer, what incentive is there for journalists to protect what Warren and Brandeis call the "inviolate personality" of the individual?[72]

More improtantly, the Black-Douglas doctrine of "no liability for the press" indiscriminately protects all journalistic expression, regardless of quality or value. As attractive as this approach may be to the press, the unfortunate implication is that anything the press may publish is, ipso facto, of value to society. While there is good reason not to provide government, including the judiciary, an opportunity to decide at whim what constitutes quality journalism, there is a pressing need to adopt an objective standard to which the courts might turn when fated with a press more damaging to individuals than

valuable to society. Without such a standard--without a theory of newsworthiness--there can be no protection against invasion of privacy by the press. The Black-Douglas doctrine, therefore, does not offer a solution to the problem of an intrusive press, instead, Black and Douglas contend that the problem is not of sufficient consequence to justify any liability for the press. Black and Douglas thus offer a theory of the First Amendment wholly at odds with a society struggling to define "vital information,"[73] a view of the Constitution in which the public is unable to direct or channel, let alone constrain, the awesome power of the press.

In contrast to Black and Douglas, Emerson recognizes the need for the individual to know "to what extent privacy will be protected," the need for the press to be able "to assess its potential liability for infringement," and the need for the courts to have "appropriate guidelines for accommodating these often conflicting areas."[74] Emerson is concerned with protecting "certain areas of individual autonomy, identity, and intimacy",[75] his approach to the problem of an intrusive press focuses on the individual, not society, and the success of his theory rests on an operationally clear definition of "matters related to the intimate details of a person's life."[76]

As conceptually compelling as Emerson's definitional approach may be, it is not quite what Emerson hopes will someday be a workable theory of privacy. For Emerson, privacy is a "developing right," and one "cannot expect it to take final, concrete shape at this point in our history."[77] Although Emerson prefers a legal doctrine that expresses itself in definitional terms, he is unable to articulate with sufficient precision the limits to the privacy right he wants to protect. In his most recent effort to reconcile the right of privacy with freedom of the press, Emerson concludes:

> In strict theory the reconciliation should be accomplished through development of a careful definition of privacy, and material falling

> within that carefully defined sphere would then be afforded full protection. This approach would seem to follow from the very nature of the right to privacy--protection for the individual against all forms of collective pressure. Unfortunately there has been no agreement on such a definition. Hence no unified theory of the right of privacy, which would serve as the foundation for constitutional protection of the various kinds of interests, which we intuitively group under the notion of privacy, has been forthcoming. This Article has not solved that problem.[78]

Consequently, Emerson is willing to settle for the very approach he initially rejects. "Accepting a balancing theory," Emerson writes, "the effort should be directed toward developing, refining, and giving specific weight to the various considerations which go into the balancing process."[79] The further development of the privacy tort will not, Emerson believes, "pose a serious threat to freedom of the press."[80] A "fair accommodation" between privacy claims and a free press and a little more concentration on the "privacy side of the equation" would, in Emerson's view, yield a satisfactory standard of liability for the press.[81]

Whether balancing is used or not, however, Emerson offers some insightful clues as to where privacy begins and ends, and conceptually, he offers an important rationale for giving serious consideration to the individual first and then to the collective interests of society. Clearly, Emerson would not extend the newsworthiness privilege to any expression "of public interest." Unlike Black and Douglas, Emerson advocates a basis for recovery against the press, although, regrettably, a full understanding of what constitutes an invasive public disclosure must await a more careful delineation of privacy in general, intimacy in particular.

If Emerson gives considerable weight to individual interests, Bloustein and Bezanson focus on the other side of the continuum; their approach calls for an emphasis on the social or public value of private facts. Bloustein, following

Meiklejohn successfully unravels the "confusion between the public's constitutional right to be informed . . . , the publisher's constitutional right to publish private gossip, and the public's thirst for lurid details of any private life",[82] and Bezanson identifies with great clarity the precise role of the disclosure, its value to the reader, and thus "the extent of constitutional protection to which it is entitled."[83] Together, they offer an impressive outline of a theory of newsworthiness based on a "right to know" interpretation of the First Amendment.

Bloustein's understanding of the First Amendment involves both an appreciation for the privacy of the individual and respect for society's need for an informed electorate. He appreciates the "anguish and mortification," the "blow to human dignity" that may result from an "unwanted witness" to private life.[84] At the same time, he recognizes the importance of a press free to inform and enlighten its readers. To establish an effective compromise between freedom of the press and the often countervailing interest in privacy, Bloustein identifies and resolves the ambiguities of "newsworthiness." He thus calls for a distinction between "public interest," meaning curiosity, and "public interest," meaning the "value to the public of receiving information of governing importance."[85] Only the latter, in Bloustein's view, deserves full First Amendment protection, the former--the public's curiosity--may be restricted when privacy is threatened. "The privacy of an individual may only be invaded by mass publication when that publication is relevant to the purposes of self-government," Bloustein argues. "In all other cases the right of the publisher should be subject to reasonable restriction in order to protect the public interest in privacy."[86]

For both Bloustein and Bezanson, newsworthiness is defined in terms of the quality and relevance of the public disclosure. As Bezanson puts it, "a public disclosure that narrows the reader's perspective or forecloses reader understanding ought to be entitled to less constitutional protection than one that deepens

and enhances understanding and perspective."[87] Thus the Meiklejohnian standard advanced by Bloustein and Bezanson not only protects the vital information the public needs to know but protects as well an individual's solitude; it both imposes limits on the press and limits on privacy.

Until and unless Emerson's theory is developed to the point where privacy is fully and clearly defined, the works of Bloustein and Bezanson--or a creative synthesis of the two--would appear to be the most attractive solution to the conflict between privacy and freedom of the press.

1. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

2. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," Harvard Law Review, 4 (December 1890): 195.

3. In addition to public disclosure of private facts, privacy could be invaded though (i) intrusion upon an individual's seclusion or solitude, (ii) publicity which places an individual in a "false light," and (iii) appropriation of an individual's name or likeness. See William Prosser, "Privacy," California Law Review, 48 (1960): 389.

4. Harry Kalven, Jr., "Privacy in Tort Law--Were Warren and Brandeis Wrong?" Law and Contemporary Problems, 31 (Spring 1966): 326-341.

5. Dorsey D. Ellis, Jr., "Damages and the Privacy Tort: Sketching a 'Legal Profile'," Iowa Law Review, 64 (July 1979): 1111.

6. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Supreme Court evaded the broader issue of the Constitutionality of publishing true but embarrassing facts and focused instead on the Constitutionality of publishing embarrassing facts obtained from public records.

7. See for example Ann-Margret v. High Society, 6 Med. L. Rptr. 1774, 1776. (S.D.N.Y. 1980).

8. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

9. See generally Comment, "The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness," University of Chicago Law Review, 30 (Summer 1963): 722-734. Curiously, even many journalism educators prefer the descriptive definition of news: "There is no need to belabor the point that news is what journalists say it is," advises one recent textbook. In the "final analysis," the authors propose, "any definition of news is going to be a tautology." See David J. LeRoy and Christopher H. Sterling, Mass News. Englewood Cliffs, N.J.: Prentice-Hall, 1973, p. 123.

10. Harry Kalven, Jr., "Privacy in Tort Law--Were Warren and Brandeis Wrong?" Law and Contemporary Problems, 31 (Spring 1966): 336.

11. Thomas I. Emerson, The System of Freedom of Expression: New York: Random House, 1970, p. 553.

12. See for example Don R. Pember, "Privacy and the Press: The Defense of Newsworthiness," Journalism Quarterly, 45 (Spring 1968): 14-24. Also, Woito and McNulty, "The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?" Iowa Law Review, 64 (July 1979): 185-199.

13. The "right to be let alone" was introduced by Judge T. Cooley in 1888 but was popularized by Warren and Brandeis in their 1890 Harvard Law Review article.

14. Alan Westin, Privacy and Freedom. New York: Atheneum, 1967.

15. Tom Gerety, "Redefining Privacy," Harvard Civil Rights - Civil Liberties Law Review, 12 (1977): 236.

16. Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," New York University Law Review, 39 (December 1964): 962-1007.

17. Emerson, p. 549.

18. Ruth Garison, "Privacy and the Limits of Law," Yale Law Journal, 89 (January 1980): 423.

19. William H. Marnell, The Right to Know. New York: Seabury Press, 1973, p.

20. Griswold v. Connecticut, 381 U.S. 479 (1965).

21. Khan v. News Group Publications, 6 Med. L. Rptr. 1429, 1430 (N.Y.S.Ct., 1980).

22. See Peter L. Felcher and Edward L. Rubin, "Privacy, Publicity, and the Portrayal of Real People by the Media," Yale Law Journal, 88 (July 1979): 1588.

23. 113 F.2d 806 (2d. Cir. 1940). For a worthwhile review of the Sidis case, see Emile Karafiol, "The Right to Privacy and the Sidis Case," Georgia Law Review, 12 (Spring 1978): 513-534.

24. Karafiol, p. 519.

25. Sidis' birthday was April 1. See New Yorker, August 14, 1937, p. 22.

26. Sidis v. F-R Publishing Corp., 34 F. Supp. 19, 20 (S.D.N.Y. 1938).

27. Ibid at 21.

28. 113 F.2d at 808.

29. Ibid.

30. 527 F.2d 1122 (9th Cir. 1975).

31. Virgil's strange behavior included reports about him eating spiders and insects, biting off the cheek of a man in a "six-against-30" gang fight, extinguishing a lighted cigarette in his mouth, and burning a hole in a dollar bill while the bill rested on the back of his hand.

32. 113 F.2d at 809.

33. Ibid. at 808.

34. Ibid.

35. Ibid.

36. Karafiol, p. 525.

37. Cox, 420 U.S. at 487.

38. 348 Mo. 1199, 159 S.W.2d 291 (1942).

39. 276 Ala. 380, 162 So.2d 474 (1964).

40. 112 Cal.App. 285, 297 P. 91 (1931).

41. 385 U.S. 374 (1967).

42. Briscoe v. Reader's Digest Ass'n, 4 Cal.3d 529, 483 P.2d 34 (1971), where the California Supreme Court upheld recovery for the truthful disclosure of plaintiff's conviction for hijacking 11 years previous to publication, would appear to be the exception. But the case was subsequently removed to a

43. 385 U.S. at 383 n.7 (1967).

44. Felcher and Rubin, p. 1585.

45. Ellis, pp. 1134-1135.

46. See Pember, pp. 16-20.

47. 420 U.S. 469, 501 (1975) (Douglas, J., concurring).

48. Time v. Hill, 385 U.S. 374, 401 (1967) (Douglas, J., concurring).

49. Ibid., at 400 (Black, J., concurring).

50. Ibid. at 402 (Douglas, J., concurring).

51. Cantrell v. Forest City Pub. Co., 419 U.S. 245, 255 (1974) (Douglas, J., dissenting).

52. Thomas I. Emerson, "The Right of Privacy and Freedom of the Press," Harvard Civil Rights-Civil Liberties Law Review, 14 (Summer 1979): 342

53. Ibid.

54. Ibid., p. 341.

55. Thomas I. Emerson, "Legal Foundations of the Right to Know," Washington University Law Quarterly, 1976 (Number 1): 22.

56. Emerson, "The Right of Privacy and Freedom of the Press," p. 343.

57. Ibid., p. 347.

58. Emerson, The System of Freedom of Expression, p. 557.

59. Alexander Meikeljohn, Political Freedom: The Constitutional Power of the People. N.Y.: Oxford University Press, 1965, p. 26.

60. Ibid.

61. Ibid., p. 79.

62. Edward J. Bloustein, Individual and Group Privacy. New Brunswick, N.J.: Transaction Books, 1978, p. 61.

63. Ibid., p. 62.

64. Ibid., p. 64.

65. Randall P. Bezanson, "Public Disclosure as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press," Iowa Law Review, 64 (July 1979): 1073.

66. Ibid., p. 1069.

67. Ibid., p. 1099.

68. Ibid., p. 1091.

69. Ibid., p. 1074.

70. Ibid., p. 1070.

71. Ibid., p. 1074.

72. Warren and Brandeis, p. 205.

73. For a worthwhile discussion of this issue, see Clifford G. Christians, "Jacques Ellul and Democracy's 'Vital Information' Premise," Journalism Monographs, No. 45 (August 1976).

74. Emerson, "The Right of Privacy and Freedom of the Press," p. 341.

75. Ibid.

76. Ibid., p. 343.

77. Ibid., p. 340.

78. Ibid., p. 359.

79. Ibid., p. 360.

80. Ibid.

81. Ibid.

82. Bloustein, p. 83.

83. Bezanson, p. 1075.

84. Bloustein, p. 55.

85. Ibid., pp. 82-83.

86. Ibid., p. 65.

87. Bezanson, p. 1070